IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

Petitioners,

No. 78-161

R.G.P. INCORPORATED, OTIS PETERSON, AND TRAVELERS INSURANCE COMPANY,

Petitioners,

No. 78-162

STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

GORDON DAHL AND 81 OTHER FARM OWNERS IN MONONA COUNTY AS AMICI CURIAE

THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE

v.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION

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OPINIONS BELOW

The opinions of the District Court for the Northern District of Iowa, Western Division are Tribe's Appendix III, Preliminary Injunction; Tribe's Appendix IV, Partial Summary Judgment; Trial Court's decision on the merits reported at 433 Fed. Supp. 57, 67, Petitioners' Appendices B & C; the opinion of the Court of Appeals for the Eighth Circuit, Petitioners' Appendix A, reported at 575 F.2d 620 (CA 8, 1978).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. The Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in reversing and remanding the decision of the trial court, which in grave error:

   a. Applied the laws of Nebraska rather than Federal laws in determining title to 2900 acres of land, which are part of 6,390 acres of land which are claimed by the Omaha Indian Tribe and the United States, which lands are situated entirely in the State of Iowa;

   b. Upheld the claims to title by the Petitioners' "squatters", to the aforesaid 2900 acres claimed by the Indians and the United States when the Petitioners did not and cannot deraign their title from patents from the United States or otherwise and were denied the affirmative defenses of the state statute of limitations, laches and estoppel;

   c. Adopted uncritically and verbatim findings proposed by the Petitioners, "squatters," which findings were declared by the Court of Appeals to be clearly erroneous having been predicated upon speculative, conjectural and otherwise nonevidentiary opinion evidence offered by Petitioners;

   d. Found, clearly in error, that the Petitioners had sustained their burden of proving their affirmative defenses that the 2900 acres in question had, in some manner, been washed away by the Missouri River and that the original 2900 acres had been totally replaced "under the sky," in the words of the Petitioners, by accretions to riparian lands in the State of Iowa, although the trial court applied the laws of Nebraska.

2. Whether the Court of Appeals erred in holding the "federal law" should be applied to the facts, the sole issue being "whether" title to the 2900 acres had passed from the Omaha Indian Tribe and the United States to the Petitioners and in reversing the trial court for applying Nebraska law to the facts before it, rather than Federal law.

3. Whether the Court of Appeals erred in declaring that the Petitioners had the burden of proof pursuant to 25 U.S.C. 194 after the Omaha Indian Tribe and the United States had made out a *prima facie* case in support of their claims to the 2900 acres and, irrespective of the fact that the Petitioners had themselves, wholly aside from 25 U.S.C. 194, unsuccessfully undertaken to prove that the 2900 acres had been totally washed away and totally replaced by accretions.

4. Whether, pursuant to the doctrine of "Strict Necessity," the Court will consider the constitutionality of 25 U.S.C. 194 when, as here, the question of the constitutionality of the Act can be avoided (a) by sustaining the decision of the Court of Appeals that the Petitioners had

failed to sustain their burden of proof, which, wholly aside from 25 U.S.C. 194, they had assumed; (b) by sustaining the decision of the Court of Appeals that the findings of the trial court were clearly erroneous; (c) by construing the language of 25 U.S.C. 194 in a manner that will sustain its constitutionality; (d) by determining that the Indian Non-intercourse Act of 1834, of which 25 U.S.C. 194 is a part, fully comports with the will of Congress and that the Congress has compelling reason for protecting the ownership and possession of Indians in lands; (e) by construing the language of 25 U.S.C. 194 as favorable and not to the prejudice of the Indians.

5. Whether the State of Iowa has any standing in regard to its Petition by reason of the fact that there are no findings of fact or conclusions of law or reference to any claims or status of the State of Iowa by the trial court or the Court of Appeals and that for practical purposes the State of Iowa was represented by the other Petitioners before this Court and for practical purposes adopted in the entirety the conjectural, speculative and nonevidentiary opinions introduced into the record by those other Petitioners, which were rejected by the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the Constitution of the United States provides, among other things:

> "Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."

Article I, Section 8, Clause 3, of the Constitution of the United States provides in part that:

> "Clause 3. *The Congress shall have Power* * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Article IV, Section 3, of the Constitution of the United States provides, among other things, that:

> "Section 3. New States may be admitted by the Congress into this Union. . . .
>
> "Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

25 U.S.C. 194, Section 22 of the Indian Non-intercourse Act of 1834, is as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

STATEMENT

Claims to Title by the Omaha Indian Tribe and the United States, Trustee: By the Treaty entered into March 16, 1854,[1] between the United States of America and the Omaha Indian Tribe, in the then Territory of Nebraska, there was established the Omaha Indian Reservation. Pursuant to that 1854 Treaty, the common boundary between the Omaha Indian Reservation and the State of Iowa was the ". . . centre of the main channel of the Missouri River. . . ." Later, when Nebraska entered the Union, the center of the Missouri River became the boundary between the State of Iowa and the State of Nebraska.

[1] 10 Stat. 1043.

In 1867, during a high water period of the Missouri River, the United States of America, acting through T. H. Barrett, Surveyor, General Land Office, Department of Interior, surveyed the exterior boundaries of the Omaha Indian Reservation. Barrett did not establish the boundary at the ". . . centre of the Missouri River. . . ." Rather, he meandered the high water line of the river, which delimits the approximately 2900 acres, title to which is the subject matter or res of these consolidated cases here involved. It is to be observed that those 2900 acres are completely encompassed by 6,390 acres, title to which is claimed by the Omaha Indian Tribe in Civil No. 4067, United States District Court, Northern District of Iowa, Western Division.[2]

T. H. Barrett subdivided the western portion of the aforesaid 2900 acres of the "Barrett Survey Lands" into 80-acre allotments. Those allotments were assigned by the Bureau of Indian Affairs to individual members of the Omaha Indian Tribe. The members of the Tribe occupied those allotments and farmed them for a great many years.[3]

The Missouri River has historically been a wild river. In the years subsequent to 1875, it drastically changed its course and by 1923 the thalweg of that stream was to the west and south of the 2900 acres within the

[2] Note: In error, the Petitioners (78-160, pp. 2-3, 8) assert that they are the "record title holders . . . of the land" and include as their App. F. Tribe's Plate II. That Plate (Tribe's App. II) was prepared based upon the 1867 Barrett Survey and delimits the boundaries of the lands claimed by Petitioners in their answers to the complaints filed by the United States and the Tribe giving rise to these consolidated cases. As disclosed on the face of the Plate in question, it does not purport and, indeed, could not show the record ownership of the Petitioners—they are "squatters" being unable to deraign title from the United States.

[3] Individual members of the Omaha Indian Tribe occupied their allotments until 1923 when the Missouri River moved into the position set forth on Plate IV, Pet.'s App., A-12.

Barrett Survey Line[4] and the lands were physically located in the State of Iowa.

From the year 1923 until the present time, the thalweg of the Missouri River has been west of the Barrett line and the 2900 acres. For many years after 1923, due to the separation of the 2900 acres from the Omaha Indian Reservation by the action of the Missouri River, neither the individual Omaha Indians nor the Tribe had access to the 2900 acres in question.

The Petitioners Are "Squatters" or "Successors of Squatters"[5]: Approximately 40 years ago, Petitioners, "squatters," or their "squatter" predecessors, went into possession of the 6,390 acres, constituting the Blackbird Bend Area, including the 2900 acres.[6] None of the Petitioners purport to deraign title to the 2900 acres, which they claim, from patents issued by the United States or otherwise.

Indian and Federal Occupancy of 2900 Acres: After having carefully delineated the 1867 Barrett Survey Line, the United States Bureau of Indian Affairs, acting in concert with the Omaha Indian Tribe and individual members of the Tribe, on April 2, 1975, went into peaceful possession of the 2900 acres encompassed within the Barrett Survey Line.[7] At no time have the Petitioners operated the 2900 acres as a family farm unit. The oc-

[4] *Ibid.*, A-12, Plate IV.

[5] A "Squatter" is defined as "one who settles on land without right or title." *Webster's Third New International Dictionary, Unabridged; Black's Law Dictionary, Revised,* Fourth Edition.

[6] There is not a scintilla of evidence offered by Petitioners—nor can they point to any—that they are "owners of record"—by patents—or that their predecessors ". . . have had possession . . ." of the 2900 acres "for as much as 80 years. . . ." Pet. Roy Tibbals Wilson, *et al.*, p. 8.

[7] Tribe's App. III, Order of June 5, 1975, 5a; Pet.'s App., A-4.

cupancy of the land by the United States and the Omaha Indian Tribe did not displace anyone living on the 2900 acres. Principal Petitioners Harold Jackson, Otis Peterson, Roy Tibbals Wilson and R.G.P., Inc., have used those lands as part of huge agribusiness operations.

After the members of the Omaha Indian Tribe and the United States had gone into possession of the 2900 acres, Petitioner Harold Jackson, a white person, and Petitioner Otis Peterson, a white person, obtained an order dated May 15, 1975, from the District Court of Iowa, Monona County. That State Court Order was against individual members of the Omaha Indian Tribe: Edward L. Cline, Clifford Wolfe, Sr., Lawrence Gilpin and others. The Order required that they vacate the 2900 acres that they had entered with the Bureau of Indian Affairs on April 2, 1975.

Tribe Granted Preliminary Injunction Against Petitioners, June 5, 1975:[8] On June 5, 1975, Honorable Edward J. McManus presiding, the trial court entered its order restraining Petitioners Jackson and Peterson from interfering with the possession and occupancy of the 2900 acres by Mr. Cline, other individual Indians, the Tribe and the United States. That Order likewise restrained the State Court from enforcing its May 15, 1975 order against Mr. Cline and other individual Indians. Judge McManus, in his Order of June 5, 1975, declared "that members of the Tribe have never totally acquiesced . . ." to the occupancy of the 2900 acres by the Petitioners.

In granting the Tribe's request for a preliminary injunction against Petitioners, Judge McManus declared that:

> ". . . the public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty. Congress [by the Indian Non-intercourse Act of 1834, 25 U.S.C. 177] has expressed its desire to protect the interests of Indians in real property by prohibiting conveyance of such lands without the consent of the government."[9]

[8] *Ibid.*, pp. 4a, 8-9a; p. 5a, note 3.

Since April 2, 1975, the United States, trustee, the Omaha Indian Tribe, Mr. Cline and other members of the Tribe have been and are now in peaceful possession of the 2900 acres, which the Tribe has been farming throughout four cropping seasons.

On October 5, 1975, the Omaha Indian Tribe, by Civil No. C 75-4067, initiated its action to quiet title to 11,300 acres including the 6,390 acres lying within the Blackbird Bend Area, which encompasses the 2900 acres here involved.[10]

Petitioners' Affirmative Defenses: Petitioners answered the complaints filed by the United States and the Tribe on behalf of Mr. Cline and the other individual members of the Omaha Indian Tribe and for themselves. Because Petitioners cannot deraign title from patents, they relied upon two affirmative defenses: (1) that the Indians and the United States had lost title to the lands by reason of the statute of limitations, adverse possession, estoppel and laches stemming from the laws of the State of Iowa; and (2) that, in some manner, the entire 6,390 acres of land, constituting the Blackbird Bend Area, including the 2900 acres here involved, were (a) entirely destroyed and

[9] Tribe's App. III, Order of June 5, 1975, p. 7a, second paragraph.

[10] Tribe's Plate I depicts the Blackbird Bend Area and the 2900 acres within the 1867 Barrett Survey Line. It also locates two areas, known as Mission Bend and Monona Bend, which are geographically separate from the Blackbird Bend Area and which have substantially different factual backgrounds. In all, the Tribe is seeking to quiet title to approximately 6,390 acres in the Blackbird Bend Area and approximately 5,000 acres in Mission and Monona Bends.

washed away by the Missouri River and (b) were completely replaced "under the sky" by accretions to the riparian lands within the State of Iowa.

Tribe Granted Partial Summary Judgment Dated April 5, 1976: [11] Relying on Section 12 of the Indian Non-intercourse Act of 1934, now codified as 25 U.S.C. 177, the Tribe moved for a partial summary judgment against Petitioners. That motion was granted upon the premise that the affirmative defenses of the Iowa statute of limitations, adverse possession and similar defenses could not be successfully interposed against the Tribe.

In granting the Tribe's motion for partial summary judgment, Judge McManus, presiding, having first cited the recent decision of *Oneida Indian Nation* v. *County of Oneida*,[12] said this:

> "The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified as 25 U.S.C. § 177." [13]

Having concluded that the last cited act proscribed the sale of land by the Indians absent government consent, the trial court concluded that, if Indian lands cannot be sold without that consent, "title cannot be obtained against them by adverse possession."

Acting *sua sponte*, the trial court, by its April 5, 1976 Order, consolidated for trial those portions of Civil Nos. 4024, 4026 and 4067, relating to the identical subject res title to the 2900 acres.[14]

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[11] See Tribe's App. IV, p. 10a.

[12] 414 U.S. 661, 667-8 (1974).

[13] Tribe's App. IV, Order of April 5, 1976, p. 10a. The cited statute *inter alia* provides that the lands may not be sold without the consent of the government.

[14] Pet's App., B-5, II, Subject Matter Of This Trial.

Trial on the Merits: On November 1, 1976, Judge Andrew W. Bogue presiding, the consolidated cases [15] came on for trial. That trial lasted in excess of one month. At the trial, hundreds of complex exhibits and thousands of pages of expert testimony were offered in evidence.

These facts are of primary importance: Because Petitioners were "squatters," [16] and because Petitioners could not invoke the State of Iowa statute of limitations,[17] they were forced, in response to the claims of the Omaha Indian Tribe and the United States, to rely solely upon the affirmative defenses that the 2900 acres had been totally washed away and totally replaced by the actions of the Missouri River. Having thus voluntarily assumed to assert the affirmative defenses last stated, the Petitioners undertook the burden of proving those defenses in the course of the trial. That assumption by the petitioners of the burden of proving their affirmative defenses was wholly independent of 25 U.S.C. 194.

1. *Petitioners Voluntarily Assumed Burden of Proof Concerning which They now Complain, Having Failed to Sustain that Burden*: A striking anamoly is presented by the Petitioners. They cannot deraign their titles from patents; they had been denied the right to interpose the affirmative defenses of the State of Iowa statute of limitations and comparable defenses.[18] Thus confronted, Peti-

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[15] Throughout the proceedings, the trial court and the Court of Appeals recognized that one of the most crucial elements confronting the Tribe, the United States and, indeed, the courts themselves is this fact: Only part of the Tribe's case, No. 75-4067, was being tried. That circumstance arose from the fact that the full Blackbird Bend Area, title to which is asserted by the Tribe in No. 4067, encompasses more than twice as much land—6,390 acres—as are contained within the Barrett Survey Line—2900 acres.

[16] See p. 7, note 5, *supra*.

[17] See p. 10, *supra*.

[18] See p. 7, note 5; p. 10, note 11, *supra*.

tioners pleaded the tenuous assertions that the Missouri River had obliterated 6,390 acres, including the 2900 acres, and had totally replaced that substantial land area.[19]

At great length, by oral testimony and demonstrative evidence, Petitioners attempted to prove their implausible contentions that the entire Blackbird Bend Area had been totally obliterated "under the sky" and completely replaced "under the sky." That contention is one of the main thrusts of the opinion of the Court of Appeals, which it rejected.[20]

On May 4, 1977, the trial court entered its Findings of Fact, Conclusions of Law and Memorandum Opinion. Judge Bogue, adopting uncritically and verbatim the findings proposed by Petitioners, found that the Petitioners had sustained their burden of proving the implausible affirmative defenses that (1) the 2900 acres had been totally obliterated and washed away by the Missouri River; and (2) the 2900 acres had been completely replaced by the actions of the Missouri River.[21] On the subject, the Court of Appeals said:

> ". . . our task is not made easier by the district court's verbatim adoption of the defendant's analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses." [22]

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[19] See pp. 9-10, *supra*.

[20] See note 21, *infra*.

[21] See Pet.'s App. A-23, note 21; A-39, VI; A-41-42; A-55, VII; A-65; A-39-40, "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence"; A-56, "There exists no factual predicate whatsoever to support this [trial court's] conclusion"; A-65, "We conclude . . . [from the record] that it is entirely speculative to determine when and how the thalweg moved to the position shown on the 1923 map."

[22] *Ibid.*, A-39. A-23, note 21. Reference is also made to the criticism of the Court of Appeals that ". . . in the present case the entire opinion of the trial court relating to the evidence and

2. *Trial Court Applied Nebraska Law to Land Situated Entirely in Iowa*: Not only did the trial court adopt uncritically and verbatim the findings of the Petitioners on all crucial factual matters, upon which its judgment was predicated, it ". . . applied Nebraska law in evaluating . . ." the facts as analyzed by Petitioners.[23] That course was adopted by the trial court irrespective of the fact that the entire rationale of the Petitioners and, indeed, the trial court, was predicated—albeit, in error—upon the alleged accretions to riparian lands entirely within the State of Iowa.

3. *Clearly Erroneous Findings of Trial Court*: In rejecting the findings proposed by Petitioners and their analysis of the evidence, which was adopted intact by the trial court, the Court of Appeals repeatedly declared that the principal findings of the trial court were conjectural, speculative and predicated upon nonevidentiary "educated guesses" and, hence, were clearly erroneous.[24]

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findings of fact is essentially a memorandum written by the defendants. Under the circumstances we feel compelled to repeat the admonition of the United States Supreme Court in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964): 'Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. *Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.* Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States* v. *Forness*, 125 F.2d 928, 942, *and do not reveal the discerning line for decision of the basic issue in the case.* (Emphasis added). . . .'"

[23] Pet.'s App., A-13.

[24] Pet.'s App., A-39-40; A-44, "We find the evidence concerning bar C to be highly conjectural and inconclusive. . . ." A-45, ". . . we regard the evidence of the defendants as insubstantial." A-46, "Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility." A-47, "Defendants' experts also relied upon inferences. . . . The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion

ARGUMENT

Petitioners Voluntarily Assumed the Burden of Proof and Failed to Sustain that Burden—The Constitutionality of 25 U.S.C. 194 Need Not Be Considered[25]: Justice Brandeis reaffirmed the constraints to which the Court adheres respecting its powers to pass upon the constitutionality of an "Act of Congress." Among those enunciated canons, these are most pertinent:

> "2. . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'
>
> "4. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.
>
> "7. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised,
>
> > *it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.*' "[26]

Those rules are especially pertinent here. The constitutionality of 25 U.S.C. 194 need not be considered. There

reached from these factual premises." A-49, note 49. A-59, The Court below made reference to the fact that a principal witness of the Petitioners conceded that the conclusions expressed were "educated guesses." A-65, "The essential inferences cannot be left to speculation or conjecture."

[25] Justice Brandeis, in his concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346-8 (1936), reviewed the rules and decisions relative to the circumstances pursuant to which a constitutional issue will be considered by the Court. Justice Brandeis states: "The Court developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

[26] *Ibid.*, 346-48 (Emphasis added).

are abundant reasons for sustaining the opinion of the Court of Appeals without resolving that issue.

As reviewed above and recognized by the Court of Appeals, the Tribe established its *prima facie* case by proving: (1) Title pursuant to the 1854 Treaty; (2) the 2900 acres were surveyed by the United States; (3) for years individual tribal members occupied the lands; (4) when the cases here involved came on for trial, the United States, trustee, individual members of the Omaha Indian Tribe and the Tribe itself were in peaceful possession of the 2900 acres.[27]

Bereft of other defenses, Petitioners undertook to prove the obliteration of the 6,390 acres, including the 2900 acres and the replacement of it. They failed.[28] The Court of Appeals rejected the evidence accepted by the trial court.[29] The Petitioners complain that the Court of Appeals erroneously labeled their purported evidence as being speculative, conjectural "educated guesses," and unsupported by substantial facts. Yet, Petitioners make no reference to the transcript of the trial court's record or to the exhibits to support their contentions against the Court of Appeals. As noted below, Petitioners suggest that the Court review the findings, which were rejected by the Court of Appeals. Obviously, that course of conduct can be of no assistance to the Court in evaluating Petitioners' complaint that the findings were not "clearly erroneous," as determined by the Court of Appeals.[30] Petitioners failed to document their assertions.

[27] Pet.'s App., A-2, A-4, A-25.

[28] See p. 12, note 21, *supra*.

[29] Pet. Roy Tibbals Wilson, 78-160, pp. 9, 29.

[30] *Ibid.*, p. 29, para. 5. Petitioners refer to the decision of the Court of Appeals that their findings adopted by the trial court were clearly erroneous. Rather than seeking to demonstrate how the Court of Appeals erred in rejecting findings based upon "educated guesses" and conjecture, Petitioners refer to the findings which were rejected—a manifest nonsequitur.

Because the application of 25 U.S.C. 194 was not necessary for the Court of Appeals to reach its conclusion, there is no need for the Court to determine the constitutionality of 25 U.S.C. 194. Thus, this immutable principle becomes applicable:

> "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." [31]

In *Light* v. *United States*,[32] the Court declared that, where the judgment "was right on the merits," the Court will decide the issues "without reference to questions arising under the Federal Constitution. . . ." In *Peters* v. *Hobby* [33] the Court stated:

> "We find, however, that the case can be decided without reaching the constitutional issues.
>
> "From a very early date, this Court has declined to anticipate a question of constitutional law in advance of the necessity of deciding it."

As if speaking to Petitioners and *amici curiae* alike, who point to possible consequences involving conjectural circumstances, which might be tried involving the constitutionality of 25 U.S.C. 194, the Court made this statement in *Raines*:

> "Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. . . .' The delicate power of pronouncing an Act of Congress unconstitutional

[31] Alma Motor Co. v. Timken Co., 329 U.S. 129, 136 (1946).

[32] 220 U.S. 523, 537-8 (1911).

[33] Peters v. Hobby, 349 U.S. 331, 338 (1955).

> is not to be exercised with reference to hypothetical cases thus imagined." [34]

Because reversal of the trial court was inevitable by reason of (1) its application of Nebraska law to lands in Iowa; (2) its reliance upon nonevidentiary matters in adopting its findings; (3) its copying verbatim and uncritically the unsupported findings of Petitioners; and (4) its refusal to acknowledge the primacy of Federal law respecting Indian affairs, the question of the constitutionality of 25 U.S.C. 194 need *not* be reached and, it is respectfully submitted, *should not* be reached.

The Court of Appeals reversed and remanded the judgment of the trial court predicated upon its ". . . firm conviction that a mistake had been committed." [35] Petitioners do not support their objections to the Court of Appeals' rejection [36] of the trial court's findings. Thus, Petitioners request the Court to assume the time-consuming task of reviewing thousands of pages of transcript and hundreds of pages of complex and highly technical exhibits to determine if Petitioners' complaint against the Court of Appeals has substance.[37]

Petitioners Request an Interpretation of 25 U.S.C. 194, Which Will Result in a Nullity: It has been emphasized above that there is no need to reach the issue of the constitutionality of 25 U.S.C. 194. Yet, the Tribe believes it is constitutional and relied upon it. 25 U.S.C. 194 is as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white per-

[34] United States v. Raines, 362 U.S. 20, 21 (1960).

[35] United States v. Gypsum Co., 333 U.S. 364, 395 (1948).

[36] See p. 15, note 30, *supra*.

[37] See *supra*, review of comments by Justice Brandeis, p. 14, note 25

> son on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

The Court of Appeals declared 25 U.S.C. 194 "clearly evidences a protectionist policy with regard to Indians." [38] The trial court expressed it as follows: ". . . public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty." [39]

Petitioners seek to avoid the historic congressional policy of protecting the Indians in their rights to their lands.[40] They assert that 25 U.S.C. 194 is limited to an "individual Indian" against an "individual white person." [41] As stated, Petitioners' interpretation precludes the United States, trustee, from appearing on behalf of an "Indian" involving litigation within the purview of 25 U.S.C. 194.[42] Similarly, it would preclude a Tribe from acting on behalf of its members.[43] Equally clear—if the interpretation of 25 U.S.C. 194, as asserted by Petitioners, is accepted—an "Indian" would be precluded from invoking 25 U.S.C. 194 when participating in multiple-party/multiple-issue litigation of the type normally necessary in real estate litigation. It would, in-

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[38] Pet.'s App., A-22.

[39] See Tribe's App. III, p. 7a, second paragraph. See, in particular, case of Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-8 (1974).

[40] Pet. Roy Tibbals Wilson, 78-160, p. 13.

[41] *Ibid.*, p. 18.

[42] See Pet. R.G.P. Inc., 78-161, p. 11 which states that 25 U.S.C. 194 relates to "one member" of the Indian race and "one member" of the white race.

[43] *Ibid.*

deed, be clear violation of the trust obligation to prevent the United States from entering cases of the character initiated by "white person" Jackson against "individual Indian" Cline. Thus, it is necessary totally to reject the interpretation by Petitioners for it renders 25 U.S.C. 194 vacuous to limit it to situations where there is a single Indian against the powerful Petitioners and the State of Iowa.[44]

Applying Petitioners' concepts to Article I, Section 8, Clause 3 of the Constitution of the United States would make suspect innumerable court decisions in regard to the applicability of that Constitutional Clause. That proviso of the Constitution declares that Congress shall regulate commerce with "Indian Tribes." To adopt the concept of Petitioners, the trust obligation of the United States, which stems from the Commerce Clause, would prevent the United States from acting on behalf of individual Indians. That, however, has not been the principle adhered to by this Court. Recently, in *Antoine* v. *Washington*,[45] the Court recognized that the United States has a trust obligation not only to "Tribes," but to individual Indians.

The plain reading of 25 U.S.C. 194 rejects the strict construction urged by Petitioners and *amici curiae* alike. That statute relates to ". . . *all trials* about the rights of property in which an Indian may be a party. . . ." The probative language of the statute relates to all trials about the rights of property in which an Indian may be involved. In seeking to achieve that explicit objective of Congress, the Court adheres to these principles of construction:

> "[The intention of Congress] . . . is to be ascertained, not by taking the word or clause in question from its

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[44] Pet. State of Iowa, 78-162, p. 10.

[45] 420 U.S. 194 (1975).

> setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will." [46]

It would be in clear violation of that expressed principle of statutory construction to adopt the concepts of Petitioners. If 25 U.S.C. 194 were limited to an "Indian" against a "white person," involving a particular tract of land, the Act would have been nullified immediately upon the death of the Indian. Thereafter, the "Indian" heirs would be required to act to preserve the decedent's property. Hence, it would no longer be an Indian against a white person; it would be several Indian heirs against the white person. It is submitted that Congress, wishing to protect Indians "in all trials" never contemplated that the death of a single Indian would render nugatory 25 U.S.C. 194. Under those circumstances, the Court rejects the maxims "ejusdem generis" and "expressio unius es exclusio alterius." It recognized that those maxims are but aids in construction and, when they would nullify the will of Congress, as proposed by Petitioners in connection with 25 U.S.C. 194, they are rejected.[47]

Statutes Are to Be Construed Most Favorably for the Indians: Petitioners and *amici curiae* seek to have 25 U.S.C. 194 construed in a manner diametrically opposed to the principles established and long adhered to by the Court in regard to legislation pertaining to Indians. Petitioners would have applied the strictest rules of construction in clear violation of the concepts as enunciated by the Court in *Choate* v. *Trapp*.[48] In rejecting the contention that a statute should be strictly construed in regard to the Indians in keeping with the principles generally adhered to, the Court said this:

> "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than an hundred years. . . ."

Numerous decisions, which adhere to that concept, support the contention that statutes of the character involved are not to be construed to the prejudice of the Indians.[49] Most recently, the Court declared:

> "The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." [50]

In *McClanahan*, the Court reviewed the concepts of construction and declared that Congressional intent must be clear to overcome ". . . the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " [51]

It is respectfully submitted that there should be adherence to these principles of statutory construction: (1) The Court will abstain from passing upon the constitutionality of 25 U.S.C. 194 for ". . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the

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[46] Helvering v. Stockholm Enskilda Bank, 293 U.S. 84, 93-4 (1934).

[47] Securities and Exchange Commission v. C. M. Joiner Leasing Corporation, 320 U.S. 344, 351, note 8 (1943).

[48] 224 U.S. 655, 675 (1912).

[49] Carpenter v. Shaw, 280 U.S. 363, 367 (1930); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353-4 (1941); Intermarriage Cases, 203 U.S. 76, 94 (1906).

[50] Antoine v. Washington, 420 U.S. 194, 199 (1975).

[51] McClanahan v. Arizona, 411 U.S. 164, 174 (1973).

question may be avoided." [52] (2) The Court, in seeking to avoid the issue of constitutionality, will determine the purpose which Congress desires to achieve rather than to seize upon isolated words and examine them "apart" from the congressional objective.[53] (3) The Court will construe doubtful statutory language in a manner favorable to the Indians and will not construe a statute to the prejudice of the Indians.[54] Those cogent concepts of statutory construction, it is submitted, will sustain the will of Congress regarding 25 U.S.C. 194 and will negate the constitutional issue which Petitioners so strongly urge.

"*. . . a compelling governmental interest*" [55] *Is Served by the Indian Non-intercourse Act of 1834, of which 25 U.S.C. 194 Is a Part*: In seeking to avoid the rationale of the Court's recent *Mancari* decision,[56] Petitioners make reference to ". . . the fulfillment of Congress' unique obligation to the Indians . . ." alluding to it, in error, as a "vague obligation." The primacy of Federal law, upon which the national trust obligation is predicated, requires the United States to fulfill its "unique obligation" in conformity with "the most exacting fiduciary standards." [57]

From the earliest moments of its history, the United States adopted a policy of protecting Indians in their ownership and possession of their lands and to ". . . guarantee the rights of Indians to specified areas of land." [58] That policy of protecting Indian ownership and

[52] See note 25, *supra*.

[53] See note 46, *supra*.

[54] See Squire v. Capoeman, 351 U.S. 1, 6-7 (1956).

[55] California v. Bakke, Slip Opinion, June 28, 1978, p. 30.

[56] Pet. Roy Tibbals Wilson, 78-160, p. 12 *et seq.*, 17. See Morton v. Mancari, 417 U.S. 535, 547 *et seq.* (1974).

[57] Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

[58] Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974). See United States v. Rickert, 188 U.S. 432, 442-3 (1903); Heckman v. United States, 224 U.S. 413, 437 (1912).

possession is part and parcel of the broad obligation of the United States as trustee for the Indians. *Mancari* relates to but a single aspect of the trust obligation owing by the United States to the Indians. It must be read together with—not separate from—the obligation of the Trustee United States to protect Indian property.[59]

The history of the Indian Non-intercourse Act of 1834, of which 25 U.S.C. 194 is a part, would preclude Petitioners' conclusions. Reference in that regard is made to the fact that the Court's decision of *Worcester* v. *Georgia* was rendered in 1832, two years antecedent to the passage of the Act in question. The trust obligation, in regard to protection of Indian rights, is reviewed in great detail in the case last cited.[60]

Congress adopted the "Ordinance of 1787; the Northwest Territorial Government." [61] Among other things, this Ordinance of 1787 provided:

> "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent. . . ."

That Ordinance provides that Indian rights ". . . shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress. . . ."

In 1790, Congress adopted the first Indian Non-intercourse Act.[62] The objective was then, as it is now, to prevent the loss of Indian lands through conveyance or otherwise without governmental consent. Justice Marshall alluded to the Act of 1802 and declared that the

[59] See effort of Petitioners to distinguish the phase of the trust obligation involved in Mancari from the phase of the trust obligation here involved. Pet. Roy Tibbals Wilson, 78-160, p. 17.

[60] 31 U.S. 515, 549, 556 (1832).

[61] Act of August 7, 1787, Ch. 8, 1 Stat. 50, Art. III.

[62] 1 Stat. 137.

boundaries of the Indian lands and the rights of the Indian to those lands are ". . . not only acknowledged . . ." but those property rights are "guarantied [sic] by the United States." [63] Chancellor Kent in his commentaries, written contemporaneously with the formulation of the policy to protect Indian rights, declared that, where Indian lands are surrounded by a non-Indian population, the non-Indians are "penetrated with a perfect contempt for Indian rights." [64] Congress recognizes today that the need to protect Indians and their property from unscrupulous land exploiters is no less pressing now than it was when the Indian Non-intercourse Act was enacted in 1834, when Chancellor Kent wrote and when Justice Marshall rendered the *Worcester* decision.

There has been an unbroken line of legislation by Congress implementing the policy of protecting Indian lands. When it became apparent to Congress that the policy of issuing allotments to individual Indians resulted in the loss of those lands through the sale to non-Indians, Congress prohibited the issuance of further allotments.[65] Congress has likewise restored to tribal ownership surplus lands within Indian reservations, which had originally been opened to entry.[66]

Most recently, Congress enacted the Indian Self-Determination Act,[67] which, among other things, provided that the Indians could be represented in litigation by counsel of their own choosing.[68]

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[63] Worcester v. Georgia, 31 U.S. 515, 556 (1832). See also Pet.'s App., A-17.

[64] 1 Kent's Commentaries, 286 (13th Ed., 1884).

[65] 25 U.S.C. 461.

[66] 25 U.S.C. 463.

[67] 25 U.S.C. 450.

[68] 25 U.S.C. 450i(f).

Repeatedly, the Court has recognized and upheld the power of Congress when it has acted to provide means which fulfill the "compelling governmental interest" to protect Indians in their ownership and possession of their lands, all as contemplated by 25 U.S.C. 194.[69] Indeed, that concept was initially adhered to by the trial court.[70]

25 U.S.C. 194 Does Not Constitute "Invidious Racial Discrimination" Against Petitioners [71]: Reliance by Petitioners and *amici* upon *California* v. *Bakke* to support their contentions that 25 U.S.C. 194 constitutes an "invidious racial discrimination" against them is clearly in error. A thorough analysis of *Bakke* reveals that, if it has any relationship to 25 U.S.C. 194, it supports the decision of the Court of Appeals. In *Bakke*, the Court referred to *Ashwander* v. *TVA* and directed that supplemental briefs be submitted to determine if it were possible that additional information might ". . . obviate resort to constitutional interpretation." [72] It is quite apparent, as emphasized above, that the failure of Petitioners here to sustain the burden they voluntarily assumed is in itself sufficient to "obviate" the necessity of this Court to turn to the constitutionality of 25 U.S.C. 194.[73] Hence, the question of whether the Act is "invidious discrimination" need never be reached.

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[69] Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 *et seq.* (1974). See p. 669, note 5, referring to "almost countless cases" recognizing the primacy of federal law where Indian interests are involved. See also United States v. Rickert, 188 U.S. 432, 442-3 (1903); Heckman v. United States, 224 U.S. 413, (1912); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 345, 347 (1941).

[70] Tribe's App. III, Order of June 5, 1975, p. 7a, second paragraph; Tribe's App. IV, pp. 12a-13a.

[71] See Pet. Roy Tibbals Wilson, 78-160, p. 11, *et seq.*

[72] California v. Bakke, Slip Op., pp. 12, 14.

[73] See p. 14, note 25, *supra.*

Bakke, however, discloses that enactments of the character of 25 U.S.C. 194 to assist a minority in its struggle to survive against an overwhelming non-Indian population will be sustained as being within the purview of the Constitution. On the subject, *Bakke* states:

> "Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance . . . [as has been done in regard to Indian properties]."

Bakke then continues:

> "When they [statutes] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis *is precisely tailored to serve a compelling governmental interest.*" [74]

Placing the burden of proof "upon the white person" when an Indian has made out "a presumption of title in himself from the fact of previous possession and ownership" comes squarely within the purview of the rule enunciated in *Bakke*. There is a "compelling governmental interest," as urged above, to sustain the Indians in the possession of their property.[75] 25 U.S.C. 194 is specifically designed for that purpose. In the words of *Bakke*, the United States of America, as trustee for the Omaha Indian people and the Omaha Tribe, has a "substantial interest" in protecting those people and their rights in regard to the lands reserved by them in their Treaty of 1854. To Petitioners' charges that 25 U.S.C. 194 accords an unconstitutional preferred status to Indians, reference is again made to *Mancari*, where it states:

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[74] California v. Bakke, Slip Op., June 28, 1978, p. 30 (Emphasis added).

[75] *Ibid.*

> "On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." [76]

Mancari refers to special legislation for Indians, making this salient point in regard to the constitutionality of special acts:

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." [77]

Having summarized numerous cases upholding special legislation favoring the Indians, the Court established the criterion which governs the constitutionality of special legislation. It said this:

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." [78]

25 U.S.C. 194 clearly comes within the purview of that declaration. It is respectfully stated that the concepts of the Court have consistently sustained acts having the objective of 25 U.S.C. 194. For that reason, it is believed that 25 U.S.C. 194 is immune from Petitioners' attacks upon it.

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[76] 417 U.S. 535, 554-5 (1974).

[77] *Ibid.*, at 552.

[78] *Ibid.*, at 555.

"The question whether title to land which has once been the property of the United States has passed from it must be resolved by the laws of the United States. . . ." [79]:

The Court, in *Oneida*, having recognized the primacy of Federal law respecting Indian lands and the exclusive and plenary power of Congress to administer them, said:

> "Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law." [80]

That immense power is spelled out with specificity in the Constitution.[81] The comprehensive and exclusive power of Congress over federal and Indian lands includes the power to prescribe the time, conditions and mode of transfer of the lands and to determine whether, when and if title is

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[79] This statement is taken from the Constitution of the United States of America, Revised and Annotated, 1972, p. 849, and is supported by an abundance of authority.

[80] 414 U.S. 661, 667 (1974).

[81] It is, of course, elementary that the Omaha Indian Treaty comes within the purview of Article VI of the Constitution which, among other things, declares that: "Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." The relationship between the Trustee United States and the Omaha Indians stems from the Commerce Clause, Art. I, Sec. 8, Cl. 3, which provides that: ". . . *Congress shall have Power* . . . To regulate Commerce . . . among the several States and with the Indian Tribes. . . ." Federal protection of Indian property comes, in part, from the Property Clause of the Constitution, Art. IV, and also arises in connection with the Federal-state relationship which, among other things, provides for the admission of states into the Union in declaring: "Section 3. New States may be admitted by the Congress into this Union. . . . Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

to pass from the United States.[82] As the Court stated in the *Camfield* decision, "A different rule would place the public domain of the United States completely at the mercy of state legislation." [83]

An exhaustive review of the pertinent authorities on the subject of the primacy and applicability of Federal law is set forth in the decision of the Court of Appeals. That in-depth review should suffice to dispose of the contentions of the Petitioners that, in some manner, the law of Iowa could control. In passing, it must be observed that the Petitioners' insistence that the laws of Iowa [84] should apply and the concomitant assertion that the trial court's opinion should be sustained is most unusual in view of the fact that the trial court ". . . applied Nebraska law in evaluating the facts of the case." [85]

Fully to support the application of Federal law, the Court of Appeals made this statement:

> "The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands. Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished." [86]

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[82] United States v. Santa Fe RR. Co., 314 U.S. 339, 345 (1941); See also p. 347. There it is declared, respecting title to Indian lands, that the "power of congress . . . is supreme." See, Light v. United States, 220 U.S. 523 (1911).

[83] Camfield v. United States, 167 U.S. 518, 525 (1897).

[84] Pet. Roy Tibbals Wilson, 78-160, p. 23, paragraphs 3 *et seq.*

[85] Pet.'s App., A-13, III, *Choice Of Law*; See A-31, note 30 for discussion of the Nebraska law as applied by the trial court.

[86] Pet.'s App., A-17.

Petitioners placed great reliance upon the Court's recent *Oregon* v. *Corvallis* decision.[87] That case is easily distinguished from the issues here presented. In *Corvallis*, title had passed from the United States; a boundary dispute was not there involved; and the Indian issue was in no sense presented. The Court of Appeals recognized the pertinency of *Corvallis* and from it takes this quotation:

> "If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary." [88]

Continuing on the subject of state boundaries, the Court of Appeals pointed out:

> "Federal common law is applicable even where only a single state is involved in a controversy with a private party. . . ."

In support of that conclusion, the Court of Appeals cites numerous decisions.[89] It is imminently clear that the Court of Appeals had no alternative but to apply the Federal law in view of the fact that the Tribe's claims to title "arises under federal law. . . ." [90]

The opinion of the Court of Appeals comports fully with—does not conflict with—the *Corvallis* decision. In *Corvallis*, the Court stated:

> " 'We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States. . . ." [91]

[87] 429 U.S. 363 (1977).

[88] Pet.'s App., A13. 429 U.S. 363, 375 (1977).

[89] Pet.'s App., A-14.

[90] Pet.'s App., A-20

Here, the entire issue is "*whether*" title to the 2900 acres passed from the Tribe and the United States, trustee, by obliteration and the replacement of it "under the sky" by the Missouri River. Under the concepts of *Corvallis*, it is free from doubt that the issues, here presented, must be resolved pursuant to Federal law.

Here, there is a single paramount issue: Has title to the 2900 acres, part of the Omaha Indian Reservation, as delineated by the 1854 Treaty and surveyed in 1867 by the United States, passed out of the Omaha Indian Tribe and from the United States, as trustee for the Tribe? Response to that issue is contained in the decision of the Court of Appeals. This statement by the Court of Appeals robs the contentions of the Petitioners and *amici* that state law is applicable: "The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands." [92] Predicated upon that succinct statement of the case, the Court of Appeals applied the historic and present-day principles of law in these terms: "State law dealing with riparian rights cannot unilaterally extinguish or deprive Indians of their tribal lands." [93]

The Court of Appeals is imminently correct in declaring that the issue here of "*whether*" title had passed from the Omaha Indian Tribe and the United States must necessarily be determined by the "federal law." That legal principle has been repeatedly adhered to by the Court.[94]

[91] 429 U.S. 363, 377 (1977).

[92] Pet.'s App., A-17, see note 15.

[93] *Ibid.*, at A-18.

[94] See Pet.'s App., A-25, V, *Law Of Accretion And Avulsion*, and cases there cited.

Petitioners and Amici Challenge the Decision of the Court of Appeals in Regard to the Law Pertaining to Accretion and Avulsion: The issue of Federal law vis-a-vis state law, which Petitioners and *amici* assert in regard to the principles of accretion and avulsion, was markedly dissipated by their own actions. As emphasized previously, they assumed the burden of proving that, in some manner, the 2900 acres had been replaced "under the sky" by accretions from the riparian lands in Iowa. They failed.[95] It would seem that, under those circumstances, the issue of accretion and avulsion would be laid to rest and that, in the state of the record, the problems to which Petitioners refer is academic.

Reference is, nevertheless, made to the contentions of Petitioners and *amici* that the Court of Appeals did not adopt the Iowa law. Federal law is controlling, all as reviewed above.[96] Petitioners assert that identifiable land is the sole criterion under the laws of Iowa to establish an avulsion.[97] Ignored by Petitioners is this fact: The trial court applied *not* Federal law; *not* Iowa law, but Nebraska law. Wholly aside from that manifest error by the trial court, this fact—contrary to the contentions of Petitioners—is of importance: The Court of Appeals did not reject identifiable lands as an element to be considered in determining if an avulsion had taken place. Rather, that Court of Appeals stated: ". . . evidence of identifiable land in place may have some probative value. . . ."[98]

What the Court of Appeals declared is this: To limit the criterion as to the proof required to sustain a claimed avulsion to "identifiable lands" is to

[95] See p. 12, note 21; pp. 13-14, note 24, *supra*.

[96] See p. 13, note 23; p. 22, note 55, *supra*.

[97] See Pet. Roy Tibbals Wilson, 78-160, p. 27.

[98] Pet.'s App., A-35.

> ". . . limit the rule to the rare situation involving only an *obvious* neck cut-off where intervening land is not submerged. The history of the rule [respecting avulsion], the case law developed under it, and the policy underlying the doctrine all support a broader application."[99]

It must be recognized that the Court of Appeals did not reverse the trial court by reason of the fact that it referred to identifiable lands, but because

> "We find the District Court too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented."[100]

It is urged that the Court of Appeals correctly applied the laws respecting avulsions,[101] and that Petitioners are in error when they seek to challenge the Court of Appeals' decision on the subject in question.

Status of the State of Iowa is Unclear: Iowa asked whether it may be divested of lands by 25 U.S.C. 194.[102] Iowa likewise inquires as to whether "federal law requires divestiture of Iowa's apparent good title to real property. . . ."[103] An examination of the trial court's Findings, Conclusions of Law and Memorandum Opinion, are devoid of any reference to a divestiture of title claimed by the State of Iowa.[103a]

There is no assertion that the Tribe seized the bed of the Missouri River or deprived Iowa of it. There is no

[99] Pet.'s App., A-35-36.

[100] Pet.'s App., A-27.

[101] See note 94, *supra*.

[102] Pet. State of Iowa, 78-162, p. 2.

[103] *Ibid.*, p. 3.

[103a] Pet.'s Apps. B & C.

contention that the Tribe has impinged upon Iowa's sovereignty. What does appear is that Iowa joined the other Petitioners in their effort to prove that the 2900 acres was obliterated and, in some manner, totally restored.[104] Yet, Iowa does not contend that it gained title by reason of that implausible, physical phenomena upon which the other Petitioners rely. Iowa, it seems, and the other Petitioners simply failed in the burden of proof which they voluntarily assumed wholly aside from 25 U.S.C. 194 and the Court of Appeals reversed, all as has been reviewed in detail.

Iowa asserts that it is not a "white person" and that the Omaha Indian Tribe is not an "Indian" within the purview of 25 U.S.C. 194. Response to Iowa's challenges as to 25 U.S.C. 194 has been reviewed in detail above.[105] Iowa and all the other Petitioners rely heavily upon the *Perryman* case.[106] That decision, whatever its merits on the facts there presented, has no bearing on these consolidated cases. In depth, there has been reviewed above the fact that Congress has the power to protect the Indians in their ownership and possession. It did so in regard to ". . . all trials about the right of property . . ." in which an Indian may be involved. It most assuredly, as stated, does not preclude the United States of America from appearing on behalf of the "Indian." Similarly, the Tribe may appear on behalf of an "Indian" involved in litigation of that character. It is unquestioned that the United States and the Tribe created a presumption of title in the Indians by the fact of previous possession and ownership.[107] Quite obviously, there was a compelling

[104] See p. 20, note 46, *supra*.

[105] See p. 18, note 38, *supra*.

[106] United States v. Perryman, 100 U.S. 235 (1880).

[107] See p. 15, note 27, *supra*.

governmental interest in the United States protecting the Indians in their possession of the 2900 acres.[108]

The Court of Appeals very properly, based upon its analysis of the numerous errors of the trial court, reversed that court. Because of the magnitude of the errors of the trial court, it is very clear that the issue of the constitutionality of 25 U.S.C. 194 need not be and will not be considered under the prevailing circumstances.[109] Like the other Petitioners, Iowa would limit the case to a single Indian vis-a-vis the State of Iowa. Quite obviously, Congress did not have such an intentment when it referred to "all trials" in 25 U.S.C. 194. Manifestly, "all trials" will include complex, multi-party/multi-issue cases of the character involved in these consolidated cases.[110]

On the subject, the manner in which a statute should be read involving either the states or the United States, the Court declared this:

> "Is the United States a resident within the meaning of the words 'residents, corporate or otherwise'? We think it is. It many times has been held that the United States or a state is a 'person' within the meaning of statutory provisions applying only to persons. . . . . . in *Stanley* v. *Schwalby*, 147 U.S. 508, 517 . . . it was held that the word 'person' used in the statute there under consideration would include the United States 'as a body politic and corporate.' " [111]

The controlling element as to whether the State of Iowa comes within the purview of 25 U.S.C. 194 is, as stated, the congressional objective in passing the Act in question.

[108] See p. 22, note 55, *supra*.

[109] See p. 12, note 21; pp. 13-14, note 24, *supra*.

[110] See p. 19, *supra*.

[111] Helvering v. Stockholms &c. Bank, 293 U.S. 84, 91, 92 (1934).

Manifestly, it was intended to protect Indians in their ownership and possession of their lands. Under the circumstances, the Court has regularly sustained acts of that character, particularly in regard to Indians where the principles of construction are to rule favorably for the Indians and never to their prejudice.[112]

CONCLUSION

Accordingly, it is respectfully submitted that the Petitions for Certiorari should be denied.

Respectfully submitted,

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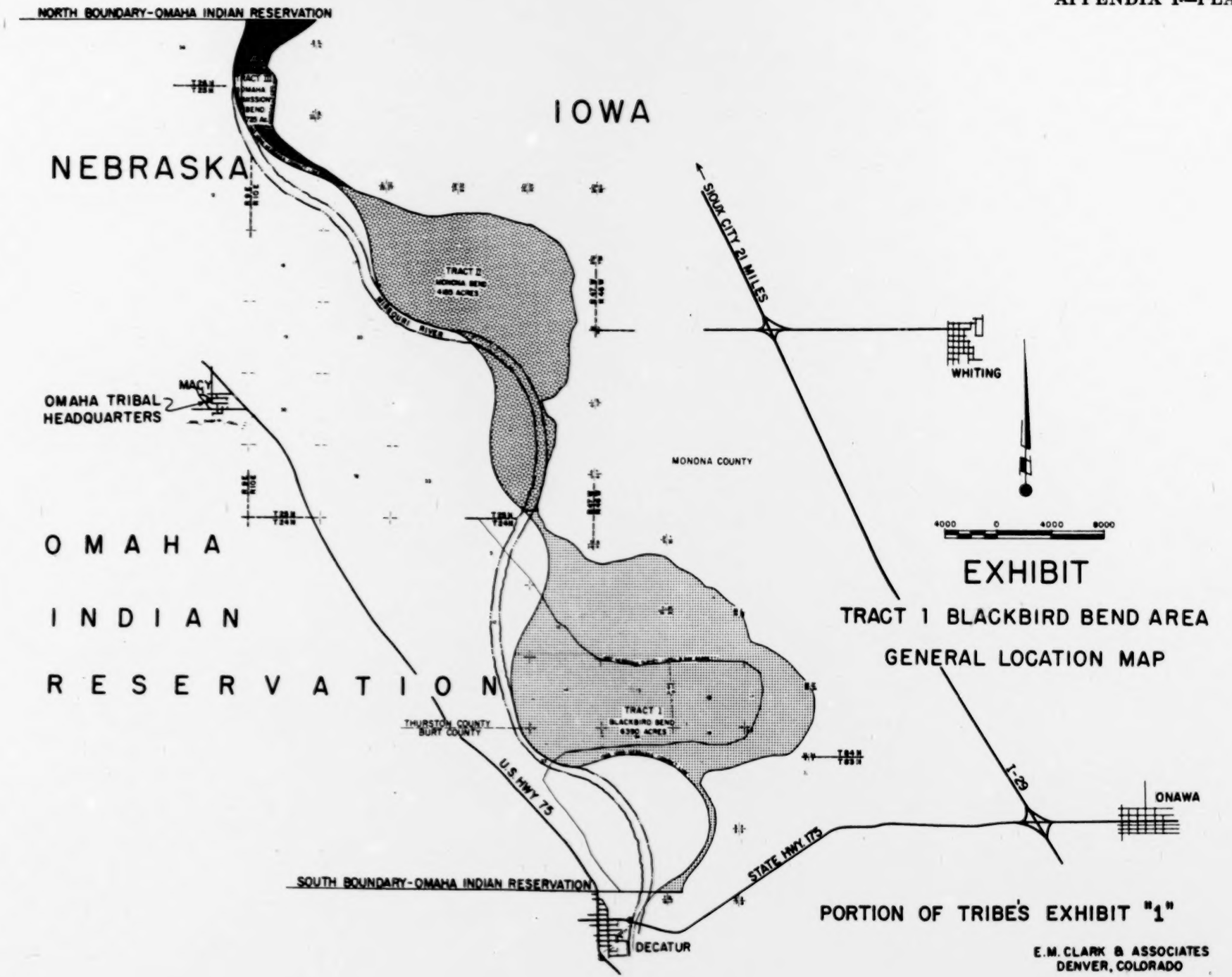
[112] See p. 20, *supra*.

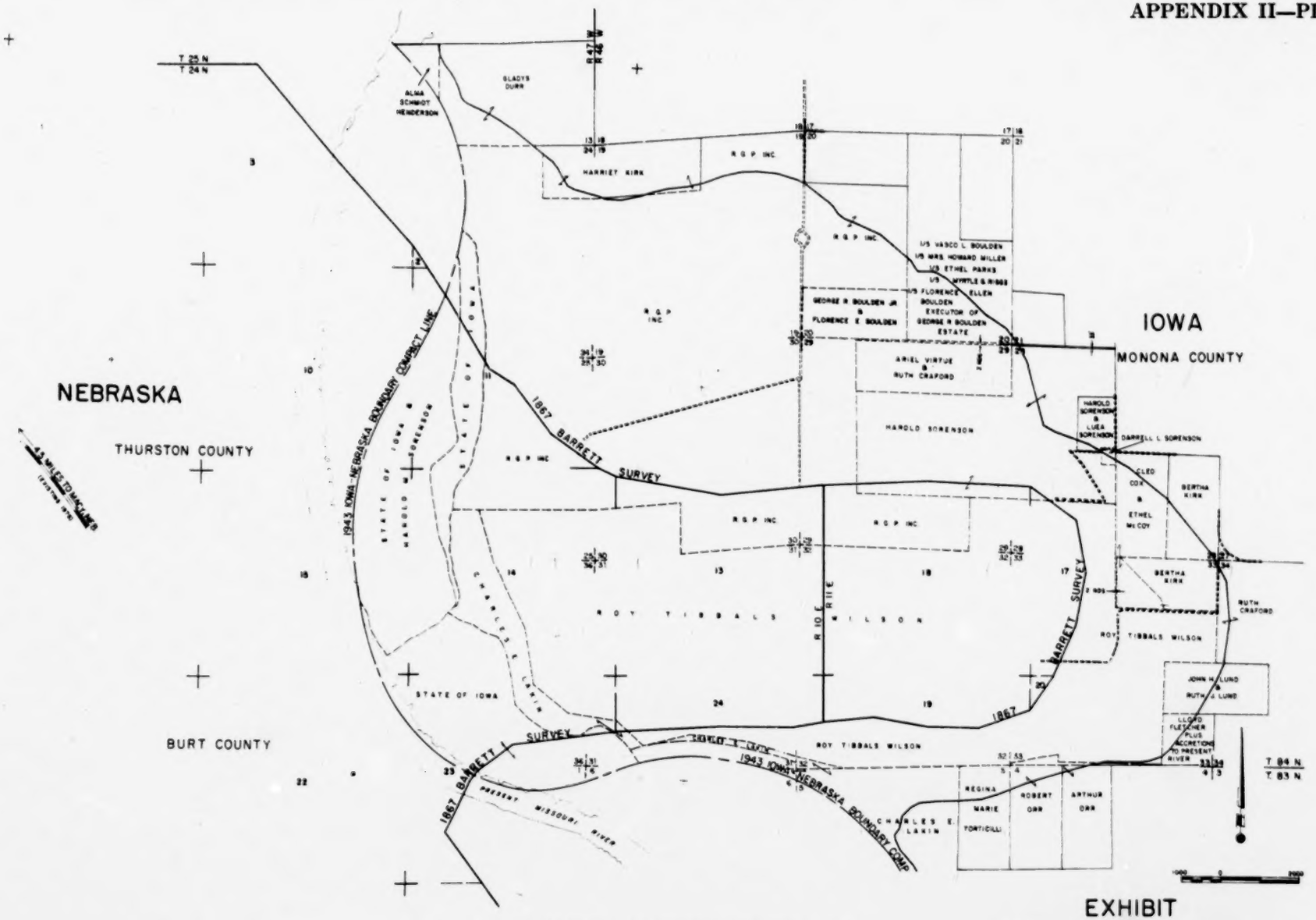
Appendices

APPENDICES

APPENDIX I—PLATE I



APPENDIX II—PLATE II



PORTION OF TRIBE'S EXHIBIT "78"

EXHIBIT

TRACT 1 BLACKBIRD BEND AREA
LAND OWNERSHIPS
COMPILED FROM
DEFENDANTS' ANSWERS
CASE C75-4067

E M CLARK & ASSOCIATES
DENVER, COLORADO

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

[Filed Jun. 5, 1975]

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, et al.,
Defendants.

ORDER

This matter is before the court on resisted cross-applications for preliminary injunctions, filed in No. C 75-4024 on May 19, 1975 by plaintiff and on May 22, 1975 by defendants, and filed in No. C 75-4026 on May 20, 1975 by plaintiff and on May 28, 1975 by defendants. The applications for preliminary injunctions have been submitted for decision by the court upon the briefs and the record filed herein.

The controversy here involves the ownership of and possessory rights to an area of land comprising approximately 3000 acres bordering on the Missouri River in

Western Iowa. During the mid-nineteenth century, the lands in question were located on the Nebraska side of the Missouri River, circumscribed by an oxbow of the River known as Blackbird Bend.

As indicated by the Barrett survey of 1867, the Blackbird Bend area of Nebraska was encompassed within the boundaries of the Omaha Indian Reservation, established pursuant to the treaty of March 16, 1854, 10 Stat. 1043,[1] with title in the United States as trustee for the Omaha Indian Tribe. The dispute arises as to the subsequent geophysical history of the contested lands.

The plaintiff in each case contends that the Blackbird Bend area became located on the eastern bank[2] through an avulsive change in the course of the Missouri River caused by channelization projects carried on by the Corps of Engineers during the 1940's. An avulsive change in the River's course would not alter the status of title to the riparian lands. *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1917); *Nebraska* v. *Iowa*, 145 U.S. 519, 12 S.Ct. 976, 36 L.Ed. 798 (1891).

Defendants contend that the disputed lands have formed through accretion to the previous eastern shore of the River. Accretions to reparian land are added to the title ownership of the landowner. *Arkansas* v. *Tennessee*, *supra*. Defendants are successors in interest to the allegedly accreted lands in this case.

The disputed area has been cleared and farmed since some time in the 1940's. Defendants Harold Jackson and

[1] The Omaha Tribe, exercising a prerogative under the treaty, selected the actual situs of the reservation in lieu of the description found in the treaty. *See Omaha Tribe* v. *United States*, 4 Ind. Cl. Comm. 627 (1957).

[2] This area became a part of Iowa when the States of Iowa and Nebraska agreed to fix their boundary line through the Boundary Compact of 1943. *See Nebraska* v. *Iowa*, 406 U.S. 117, 120 n. 4, 92 S.Ct. 1879, 31 L.Ed.2d 733 (1972).

Otis Peterson have leased the contested premises for the current crop year from Roy T. Wilson and Raymond G. Peterson, respectively. During April of this year, members of the Omaha Tribe, acting under authority of the Tribal Council, have entered upon the lands and posted signs declaring the area to be part of the Omaha Reservation. Bureau of Indian Affairs (BIA) officials assisted them in delimiting the boundaries.

Harold Jackson and Otis Peterson instituted an equity action on April 23 in Iowa District Court for Monona County[3] seeking to enjoin members of the Tribe from entering upon the contested real estate. On May 16,[4] following an amendment to the petition, the Iowa District Court issued a temporary writ of injunction restraining all members of the Tribe from entering upon said lands or interfering with the farming thereof by the plaintiffs in that case.

The United States in No. C 75-4024 seeks to quiet title to all lands in the Blackbird Bend area which allegedly remain a part of the Omaha Indian Reservation. The United States also prays for preliminary and permanent injunctions restraining defendants from prosecuting Equity No. 18965 in the State court, from attempting to enforce the aforementioned orders of the State court, and from interfering with the possession, use, or occupancy of the lands in question by the Tribe.

In No. C 75-4026, the Omaha Tribe eschews a quiet title action, asserting that the institution of such an action by the United States is an ineffectual way for the Government to protect its ownership rights as trustee in the contested lands. Preliminary and permanent injunc-

[3] Equity No. 18965, District Court of the State of Iowa in and for Monona County.

[4] On May 15, the court issued an order enjoining only certain named members of the Tribe from entering upon the disputed area.

tions similar to those in No. C 75-4024 are sought by the Tribe, and the applications for preliminary injunction in both cases are therefore being considered simultaneously in this ruling. Defendants in each action seek a preliminary injunction enjoining all persons other than the defendants from interfering with possession of the contested lands by the defendants.

The granting of a preliminary injunction rests within the sound discretion of the court, with the burden on the applicant to show a substantial probability of success on the merits and irreparable injury absent issuance of an injunction. The two other factors to be considered are the likelihood of harm resulting to other parties to the proceedings, and the nature of any public interest to be served by granting the injunction. *Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973); *Allison* v. *Froehlke*, 470 F.2d 1123, 1126 (5th Cir. 1972); *Behagen* v. *Intercollegiate Conference of Faculty Rep*, 346 F.Supp. 602, 603-604 (D. Minn. 1972).

Considering these factors as applied to this case, it is the court's view that plaintiffs are entitled to some form of a preliminary injunction.

It is undisputed that the Blackbird Bend area was previously within the Reservation boundary. The staff of the BIA has concluded, and the Solicitor of the Interior Department concurred in the conclusion, that approximately 3,190 acres in the Blackbird Bend region were still owned by the United States as part of the Reservation. Other than conclusory statements, defendants have produced no evidence to the contrary at this time.

The irreparable injury to be incurred here is the total loss of a growing season if one party or the other is not promptly prohibited from interfering with the other's attempts to farm the land. At present the apprehensiveness on both sides has prevented all but 160 acres of corn from being planted in the area.

The probability of financial injury to the defendants, tenants and purported landowners of the area in question, is substantial, but will be reduced by the court's form of injunction as set out below, which will require the net profits from this year's farming operation to be deposited with the Clerk of Court pending final determination of the quiet title action.

Finally, the public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty. Congress has expressed its desire to protect the interests of Indians in real property by prohibiting conveyance of such lands without the consent of the government. 25 USC § 177; *United States* v. *7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). A preliminary injunction is an appropriate provisional remedy when special federally protected rights of Indians are threatened. *Organized Village of Kake* v. *Egan*, 80 S.Ct. 33, 4 L.Ed.2d 34 (1959) (Brennan, J., acting in capacity of circuit justice).

Defendants argue that a preliminary injunction is intended to maintain the status quo, 7 *Moore's Federal Practice* § 65.04[1], and the status quo is defined as the last uncontested status which preceded the pending controversy. *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F.2d 804, 808-809 (9th Cir. 1963); *Westinghouse Electric Corp.* v. *Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958). It is asserted by defendants that their possession in previous years was the last peaceable and uncontested occupancy, and that granting plaintiffs a preliminary injunction essentially awards them relief to which they would only be entitled upon a favorable determination on the merits.

The court cannot agree. The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land, and the Monona County Assessor apparently felt unsure enough of the status of title to

omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course. But most significantly, the court views the present occupation by the Omaha Tribe, with the approval of the Tribal Council acting pursuant to its authority under 25 USC § 476, and with the assistance of the BIA acting in its capacity as an executive agency, constitutes the status quo to be preserved. Designees of the Tribal Council have planted 160 acres and tilled another 500 acres, the only farm work done this spring in the area.

Since the United States is here seeking an injunction to prevent threatened irreparable injury to a federally protected interest, to wit, possession of and title to lands originally owned by the United States in trust for the Omaha Indians, the prohibition against enjoining state court proceedings in 28 USC § 2283 is not applicable here. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957); *United States* v. *Akin*, 504 F.2d 115 (10th Cir. 1974) (United States suing as trustee of water rights held on behalf of Indian tribes).

The State of Iowa entered a special appearance in this matter to contest jurisdiction because of improper service. Though subsequently served, the State argues that the delayed notice has prevented it from preparing detailed exhibits and arguments. The State asks that the land to which it claims an interest, and which is not under cultivation, be exempted from any injunctive decree. No accurate legal description of this property having been submitted, the court is unable to specifically position or exempt this parcel, but will entertain a motion for relief from the decree should the State deem it necessary.

It is therefore

ORDERED

1. Defendants' applications for preliminary injunction denied.

2. Plaintiffs' applications for preliminary injunction granted.

3. Each and every defendant, his agents, employees, and successors in interest, is hereby enjoined and restrained from interfering with the use and occupancy of the lands hereinafter described by the Omaha Tribe and its individual members, agents, employees or designees, and from prosecuting or attempting to prosecute that action heretofore filed in the District Court of Iowa in and for Monona County, entitled *Jackson, et al.* v. *Cline, et al.*, Equity No. 18965, and from attempting to enforce any orders in said states court action directing any individual member of the tribe to vacate any portion of the lands hereinafter described, or any such orders permitting any of the defendants herein to occupy any portion of said lands, until such time as this case may be heard and final judgment entered. This order shall apply to all lands described as follows, and which are east of the 1943 Iowa Nebraska compact line and which have not been allotted to individual members of the Omaha Tribe and thereafter sold to nonmembers.

* * * *

4. Plaintiff Omaha Indian Tribe shall deposit with the Clerk of Court the net profits received for all crops harvested from the aforesaid lands during the calendar year 1975, together with a report of receipts and disbursements.

June 5, 1975.

/s/ Edward J. McManus
EDWARD J. MCMANUS
Chief Judge
United States District Court

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, et al.,
Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, et al.,
Defendants.

ORDER

This matter is before the court on the following motions:

* * * *

Also ripe for decision are rulings previously reserved [1] concerning motions for payment of winter wheat crop

[1] Order of December 15, 1975, in Nos. C 75-4024 and C 75-4026.

expenses and for allocation of certain corn harvest proceeds and expenses.

* * * *

Motions to Dismiss

Numerous defendants in No. C 75-4067 move to dismiss on the ground that no claim is stated because it appears upon the face of the complaint that all claims alleged are barred by the pertinent Iowa statute of limitations, § 614.1(5), Code of Iowa (1975). It is the court's view that the motion is not well taken.

Even assuming Iowa law to be applicable on this issue, the Iowa high court has consistently held that the doctrine of adverse possession as governed by the statute does not affect a change of title against governmental bodies so as to prevent the exercise of their governmental functions. *E.g., Twining* v. *City of Burlington*, 68 Iowa 284, 27 N.W. 243 (1886); *Johnson* v. *City of Shenandoah*, 153 Iowa 493, 133 N.W. 761 (1911); *Sioux City* v. *Betz*, 232 Iowa 84, 4 N.W.2d 872 (1942). Here the United States is a named party in one action and has a governmental interest in protecting the title of all lands held in trust for an Indian tribe pursuant to treaty. *See Heckman* v. *United States*, 224 U.S. 413, 437-438, 32 S.Ct. 424, 56 L.Ed. 820 (1912).

Furthermore, plenary control over tribal rights to Indian lands became the exclusive province of Federal law upon adoption of the Constitution. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified at 25 USC § 177.

The latter statute provides *inter alia*:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any

> Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

If title to tribal lands is not alienable by the Indians, *a fortiori* title canont be obtained against them by adverse possession. *United States* v. *Schwarz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972); *United States* v. *7,405.3 Acres of Land*, 97 F.2d 417, 422-423 (4th Cir. 1938).

* * * *

Motion for Partial Summary Judgment

Plaintiff Tribe moves for summary judgment on several issues raised by way of affirmative defenses in the answers of certain defendants. Summary judgment is appropriate only where no genuine issues of material fact remain unresolved and the movant is clearly entitled to judgment as a matter of law. Rule 56, FRCP; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Chicago & Northwestern Ry. Co.* v. *Hospers Packing Co., Inc.*, 363 F.Supp. 697 (N.D. Ia. 1973). Here defendants have failed to file any resistance generating factual issues as required by Rule 56(e), FRCP, and it appears that the issues remaining on these defenses are largely questions of law.

The court has previously indicated that it has subject matter jurisdiction over these actions, 28 USC §§ 1331, 1345, 1362, and plaintiffs' motion is granted on this issue. It is also the court's view that the complaints do state a cause of action, and the motion will also be granted on this issue.

With respect to those issues listed in subparagraphs c-h, summary judgment is appropriate as a matter of law only with respect to the establishment of title aspects and not on the damages issues. As stated above, state

statutes of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action. *United States* v. *Schwarz*, *supra* at 1372. Summary judgment will be granted to the extent indicated above, and denied in all remaining respects.

* * * *

It is therefore

ORDERED

* * * *

9. Motion for partial summary judgment granted on those issues indicated in text and denied in remaining respects.

* * * *

April 5, 1976.

/s/ Edward J. McManus
EDWARD J. MCMANUS
Chief Judge
United States District Court